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No. 03-1488

Supreme Court, U.S.
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In The Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division One

BRIEF OF *AMICI CURIAE* LOS ANGELES TIMES COMMUNICATIONS LLC, CABLE NEWS NETWORK LP, LLLP, ADVANCE PUBLICATIONS, INC., U.S. NEWS & WORLD REPORT, L.P., DAILY NEWS L.P., BELO CORP., DENVER POST CORPORATION, THE WASHINGTON POST, THE COPLEY PRESS, THE NEW YORK TIMES COMPANY, BLOOMBERG NEWS, THE HEARST CORPORATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, AND ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici, which are listed on the inside cover and described in Appendix A, are leading newspapers, magazines, broadcasters, publishers, media-related organizations, and professional associations who are actively engaged in disseminating information in the United States and abroad.[1] They share petitioners' fundamental interest in enforcing the First Amendment's strenuous prohibition against prior restraints. Because the California Court of Appeal's opinion condones an unconstitutional prior restraint on speech about a public figure, in contravention of this Court's unambiguous precedents, *Amici* respectfully submit this brief in support of petitioners.

SUMMARY OF ARGUMENT

This Court repeatedly has recognized that government censorship of the press in the form of prior restraint constitutes "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Indeed, this Court has declared that prior restraints of the press may be justified, if at all, "only in the exceptional cases," such as to prevent the dissemination of information about troop movements during wartime, or to "suppress[] information that would set in motion a nuclear holocaust." *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971) ("*Pentagon Papers*") (Brennan, J., concurring). Accordingly,

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[1] Petitioners and respondent have consented to the filing of *amici curiae* briefs. Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

this Court has rejected the use of prior restraints against the press, even where the publications sought to be enjoined were found to be defamatory and offensive. *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 716-18 (1931).

The California Court of Appeal has denied petitioners Ulysses Tory and Ruth Craft the most fundamental protections of the First Amendment by affirming a permanent injunction that prohibits them from making *any* future statements in *any* public forum about an admitted public figure, respondent Johnnie L. Cochran, Jr. The California court concluded that the constitutional bar on prior restraints did not apply to petitioners in large part because petitioners are "private persons," not members of the press publishing a "legitimate publication."

The decision below cannot be downplayed on the theory that it is an isolated case or that it "only" censors two ordinary citizens. It is not that simple. The injunction effectively prohibits petitioners from talking to the press about one of the Nation's most prominent attorneys – permanently. The press relies on "private persons" like petitioners to provide their knowledge and opinions of public figures, which the press disseminates to the public. But prior restraints, even those directed against private citizens, choke off crucial information to the press and public, reducing the free flow of information. Public discourse is chilled.

Without a clear ruling from this Court reaffirming the historical and constitutional prohibition against prior restraints, the well-established bulwark for free speech and a free press will be eroded, stone by stone. As petitioners noted in their Petition for Certiorari, several federal circuit courts and state courts have affirmed defamation-based prior restraints against non-media defendants.

Other public figures, relying on those incorrect prior restraint decisions, are certain to ask courts to censor future speech any time they successfully prove to a judge that past statements were defamatory. Some courts may extend these incorrect prior restraints to the press itself. The Court should not leave the door open to ever-expanding prior restraints against the press and its sources. Each time a court permits injunctive relief, prior restraint becomes less and less "extraordinary," to the detriment of the public and its democratic system. Simply reversing the decision below on narrow grounds will not adequately protect the press and its sources from the chilling effect of these prior restraints.

The purported safeguard offered by the California Court of Appeal – a trial by a judge – is no safeguard at all. The enjoined speech ultimately may be declared nondefamatory by a jury or an appellate court, the latter a distinct possibility where constitutional issues such as actual malice are subject to independent appellate review. *Bose v. Consumers Union*, 466 U.S. 485, 510, 484-85, 508-09 & n.27 (1984). Yet any reversal would not cure the harm to the public and press because the relief would come after the public interest in the topic or issue had abated. Moreover, even if a judge finds that past statements were defamatory, that does not mean that future statements are certain to be false, defamatory, injurious, or made with the requisite degree of fault. New information may become available supporting the truth of a statement. It is impossible to predict the nuance, context, and content of a statement until it is spoken or published. A phrase may assert an actual fact in one context, but may clearly be protected as opinion, hyperbole, or parody in a different context. Because it is impossible to predict whether all such future statements would be actionable, a

court injunction barring such speech is flatly unconstitutional.

Amici, therefore, respectfully request that this Court not only reaffirm the historical and constitutional prohibition against prior restraints against the press, but also declare unconstitutional prior restraints against individuals who make statements to the public or press about public figures. Such a clear rule is necessary to safeguard our "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964).

ARGUMENT

I. PRIOR RESTRAINTS ARE ANTITHETICAL TO THE FIRST AMENDMENT RIGHTS THAT ARE AT THE CORE OF OUR DEMOCRACY.

A. This Nation's Courts Consistently Have Vacated Injunctions Barring Future Speech By The Public And The Press Based On An Historical Mistrust Of Government Censorship.

When a branch of government, including the judiciary, blocks the publication of information, it undermines the "main purpose" of the First Amendment, which is "to prevent all such previous restraints upon publications as [have] been practiced by other governments." *Nebraska Press*, 427 U.S. at 557 (quoting *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)). This Court has "learned, and continues to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers." *Nebraska Press*, 427 U.S. at 560 (quoting *Miami Herald*

Publ'g Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring)). Thus, "[r]egardless of how beneficent-sounding the purposes of controlling the press might be," this Court has "remain[ed] intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." *Id.* at 560-61 (quoting *Tornillo*, 418 U.S. at 259 (1974) (White, J., concurring)). It is widely agreed that "[t]here is, indeed, something peculiarly totalitarian about government systems of prior restraint." Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 15:10 (2004) ("*Freedom of Speech*").

This Nation's abhorrence of prior restraints on speech has its roots in fifteenth-century England, when the English Church first required that all religious books be approved by the diocese before publication. *See* Michael I. Meyerson, *Neglected History of the Prior Restraint Doctrine: Rediscovering The Link Between The First Amendment and the Separation of Powers*, 34 Ind. L. Rev. 295, 302 (2001) ("*Neglected History*"). After the Crown wrested control of the Church in the early 1530s, the Crown adopted the Church's censorship mechanism of requiring pre-publication approval of all books, pamphlets, plays, and ballads; and it completely barred all anonymous publications. *Id.* at 298. This enabled the Crown to eliminate public criticism and to restrict independent thought. Meanwhile, the English Star Chamber, named for the gold stars that adorned its chambers, was "an unhealthy hybrid of legislature and court" that acted as both judge and jury in licensing all books. *Id.* at 298, 302. It began persecuting "those 'wicked and evil disposed persons' who had published without prior approval." *Id.* at 298, 302 (quoting Star Chamber Decree of 1637, reprinted in 2 *Complete Prose Works of John Milton* 793 (1959)). One of

the Star Chamber's most notorious prosecutions was of Calvinist William Prynne, whose tract criticized the practices of the Presbyterian Church. Prynne was convicted in summary proceedings of seditious libel, or impermissible criticism of the government, and was sentenced to a fine and the removal of his ears in a public mutilation. *Id.* at 302. Although the Star Chamber was abolished in 1641, and Parliament's subsequent licensing scheme expired in 1695, the harsh censorship scheme that they symbolized served as a continual reminder of the danger arising from "the arbitrary and uncontrollable abuse of power both in England and the United States." *Id.* at 299.

A counterweight to arbitrary government censorship emerged in both England and the colonies: the jury. When Pennsylvania founder William Penn was criminally charged with illegal preaching on a London street corner in 1670, the jury refused to convict him; the jury did the same in the 1735 seditious libel trial of newspaper publisher Peter Zenger in New York. *Id.* at 305, 318. "It became an article of faith for those in the colonies that the jury was an essential buffer against abuses of authority, whether by governors, parliaments, or judges," prompting one colonial author to proclaim that the jury provides "the glorious security thereby given for Freedom in writing and speaking." *Id.* at 319.

The Zenger trial, while not creating any legal precedent, also became a lasting symbol of the dangers of prior restraints and the need for strong prohibitions against censorship. Zenger was a printer who published the *Weekly Journal*, the first politically independent newspaper in North America. He was tried for criminal libel for publishing scathing essays about New York Governor

William Cosby – essays that Zenger did not write but merely published. Smolla, *Freedom of Speech* § 1:4 (2004). Although truth was not then recognized as a permissible defense, Zenger's attorney, Alexander Hamilton, argued to the jury that it should be, and further asserted that only a jury, not a government official, could decide the criminality of the publication. *Id.* The jury took only a few minutes to acquit Zenger. *Id.*

Hamilton's arguments were echoed by English jurist William Blackstone, who was among the first English commentators to speak out against prior restraints on speech and the press. In his 1765-66 essays, Blackstone declared that "'[t]he liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and in freedom from censure for criminal matter when published.'" *Id.* at 311 (quoting 4 William Blackstone, *Commentaries on the Laws of England* 152 (Wayne Morrison ed., 2001)). Blackstone emphasized the special role of the press in a free society, saying that a "liberty of the press is indeed essential to the nature of a free state" and that "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press." Smolla, *Freedom of Speech* § 15:2 n.3 (quoting Blackstone, *Commentaries on the Laws of England*, bk. IV, ch. XI, 151-52 (London, 1765-69) (18th ed., New York, 1836, vol. 2, 112-13).

But it was the Founders' rejection of the English licensing schemes that led to the drafting of the First Amendment, and while there was debate over the extent of the protection, "one element of liberty of the press was well-understood: no governmental official – not licensor, not censor, not judge – should be involved in restricting

expression before it is communicated." Meyerson, *Neglected History*, 34 Ind. L. Rev. at 313. Justice Joseph Story later explained in his essays that the First Amendment guaranteed "the right to publish without any previous restraint, or license," and also guaranteed the right to have the published statements "tried by a jury" if they are challenged as "unlawful, or libelous." *Id.* at 322 (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1878-79 (1833)); *see also Near*, 283 U.S. at 713 (relying on Blackstone and comparing the system of restraint in *Near* to the English licensing schemes).

During the century that followed Story's essays, a majority of state courts and federal circuit courts developed a strong consensus that prior restraints directed at journalists and non-journalists alike were impermissible, creating a body of law that eventually informed this Court's decision in *Near*. Before *Near*, this bar on prior restraints rested largely on three grounds: free speech and free press protections arising from state constitutions; the jurisdictional division between common law and chancery courts; and the defamation defendant's right to a jury trial. The courts that relied on their state constitutions also recited the Nation's historical rebellion against the Star Chamber and English licensing schemes.

California courts have been especially wary of prior restraints, both because of the history of Star Chamber proceedings in England and also because Mexican California operated under the *alcalde* judicial system derived from the Spanish Inquisition, where community officials would act as prosecutor and judge in secret criminal and civil proceedings, including claims for libel and slander. David J. Langum, *Law and Community on the Mexican California Frontier* 70-73, 103, 122-23 (1987). The secret

proceedings were widely criticized at the time because of the corrupting power inherent in granting broad powers to one judicial official, whose judgments were often tainted by personal interests. *See id.* at 33, 146-49 & n.59.

One of the first prior restraint decisions was issued more than 100 years ago by the California Supreme Court in *Dailey v. Superior Court*, 44 P. 458 (1896). Relying on the state's constitutional protection for free speech and the jurisdictional division between equity and common law courts, the court vacated a cease-and-desist order that prohibited the staging of a play, "The Crime of the Century," based on an ongoing murder trial. *Id.* at 459. The court concluded that the "attempted restraint upon the right of free speech" violated the state constitution, that "petitioner's mouth could not be closed in advance for the purpose of preventing an utterance of his sentiments," and that the play's producer could be held "responsible to the law for an abuse of that right" after he exercised his free speech rights. *Id.* at 460. As for the criminal defendant who had obtained the order, the court held that his remedy was a request for a second trial if his fair trial rights were infringed by the play. *Id.*

Similarly, the Missouri Court of Appeals relied on that state's constitutional free speech protections when it vacated an injunction barring allegedly libelous statements about a life insurance company. *Life Ass'n of America v. Boogher*, 3 Mo. App. 173, 1876 WL 9671, at *1-3 (Mo. App. Dec. 18, 1876). The fact that the defendants used the libelous statements "to levy black-mail" on the plaintiff and were not dissuaded by the threat of damages due to their insolvency was deemed to be irrelevant by the court. *Id.* at *1-2. Instead, in affirming the primacy of the right to free speech, the Missouri court declared:

> If it be said that the right to speak, write, or print, thus secured to every one, cannot be construed to mean a license to wantonly injure another, and that by the jurisdiction claimed it is only suspended until it can be determined judicially whether the exercise of it in the particular case be allowable, our answer is that we have no power to suspend that right for a moment, or for any purpose.

Id. at *2.

Alternatively, early courts relied on the jurisdictional division between chancery courts and common law courts and the right to a jury trial to vacate injunctions based on defamatory speech. For example, in *Kidd v. Horry*, 28 Fed. 773 (3d Cir. 1886), the Third Circuit refused to enjoin the publication of allegedly libelous letters that disparaged a business rival, explaining that "[c]harges of slander are peculiarly adapted to and require trial by jury in all cases at common law." *See also American Malting Co. v. Keitel*, 209 F. 351, 354 (2d Cir. 1913) ("[e]quity will not restrain by injunction the threatened publication of a libel, as such, however great the injury to property may be") (quoting Pomeroy's Equity Justice, vol. 6, sec. 629 and citing numerous pre-*Near* decisions vacating defamation-based injunctions); Meyerson, *Neglected History*, 34 Ind. L. Rev. at 324-35 (citing pre-*Near* prior restraint cases); *Near*, 283 U.S. at 719 n.11 (same).

When this Court first rejected an injunction against allegedly defamatory statements in *Francis v. Flynn*, 118 U.S. 385, 389 (1885), it did so on jurisdictional, not constitutional, grounds. The case apparently did not involve the press, but rather arose from a business dispute between rival Mississippi River boat owners. This Court vacated the lower court's injunction against over 30 defendants

who allegedly caused libelous "publications in newspapers." In a terse opinion, Justice Field told the plaintiff that he had gone to the wrong court by seeking an injunction in equity: "If the publications in the newspapers are false and injurious, he can prosecute the publishers for libel." *Id.* at 389. The Court warned that "[i]f a court of equity could interfere and use its remedy of injunction in such cases, it would draw itself into the greater part of the litigation properly belonging to courts of law." *Id.*

When this Court decided *Near* in 1931, it added to the jurisdictional objections arising from prior restraints a much stronger rationale: the First Amendment prohibition against government censorship.

B. This Court Rejected A Libel-Based Injunction As Unconstitutional In *Near v. Minnesota*, Even Though A Judge Had Determined That The Enjoined Statements Were Defamatory.

When this Court again was presented with a libel-based prior restraint in *Near v. Minnesota*, 283 U.S. at 703, the Court considered for the first time the First Amendment protections for a free press as applied to the states. The facts of *Near* are strikingly similar to the facts of the instant case. Jay M. Near was the publisher of a Minneapolis newspaper, *The Saturday Press*, who published statements about men who were serving in public office – the mayor of Minneapolis, the city's chief of police, and a local prosecutor, among others. *Id.* at 704. The defendant accused the men of a "gross neglect of duty" for failing to crack down on local gambling, bootlegging, racketeering, and an attempted assassination of a journalist. *Id.* The published statements were inflammatory and

anti-Semitic, railing that "Jewish gangsters," "Jew thugs," and "snake-faced gangster[s]" had "bought and paid for" the police chief, and had corrupted the prosecutor, the mayor, and a member of the grand jury. *Id.* at 626-27, 634 n.1.

The local prosecutor filed a civil complaint against the publisher in state court, alleging that the newspaper had violated a state public nuisance law barring "any person" or "organization" from publishing or circulating "a malicious, scandalous and defamatory newspaper, magazine or other periodical." *Id.* at 702-03. Like respondent here, the prosecutor in *Near* alleged that the defendant had published defamatory statements in the past and he sought a permanent injunction barring the newspaper from publishing any "malicious, scandalous and defamatory" statements in the future. *Id.* Like the California trial court in the instant case, the Minnesota state court judge held a hearing, examined the statements that were introduced into evidence, and made findings of fact that the published statements were "malicious, scandalous and defamatory." *Id.* at 706. The court then issued a broad injunction permanently enjoining defendant Near from publishing or circulating "any publication whatsoever which is a malicious, scandalous or defamatory newspaper." *Id.* Although defendant Near asserted that the statements were neither false nor defamatory, and that the injunction violated his First Amendment rights, these arguments were rejected by the trial court and by the Minnesota Supreme Court. *Id.* at 705.

When *Near* reached the United States Supreme Court, Chief Justice Charles Evans Hughes declared that it "raise[d] questions of grave importance transcending the local interests involved in the particular action," and

presented an "inquiry . . . as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty." *Id.* at 707-08. Drawing on the historic "struggle" in England and in this country against government censorship of the press, the Court struck down the Minnesota statute and injunction and in doing so, announced a broad First Amendment restriction against prior restraints. This Court declared that "the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints and censorship." *Id.* at 716. The Court instructed that "public officers, whose character and conduct remain open to debate and free discussion in the press, [must] find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals." *Id.* at 719. The Court described the injunction, which barred any future publication by the newspaper without prior court approval, as "the essence of censorship." *Id.* at 713.

Justice Hughes concluded that prior restraints are permitted "only in exceptional cases." *Id.* The list of possible circumstances where this might be available was short: "When a nation is at war," Justice Hughes suggested, prior restraint might be permissible to "prevent actual obstruction to [government] recruiting service [for the military draft] or the publication of the sailing dates of transports or the number and location of troops," or to prevent "incitements to acts of violence and the overthrow by force of orderly government." *Id.* But the Court observed that such instances are so rare that "for approximately one hundred and fifty years there has been almost

an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers," demonstrating "the deep-seated conviction that such restraints would violate [a] constitutional right." *Id.* at 718 & n.11 (citing state cases).

This Court's antipathy toward prior restraints expressed in *Near* was "so universally accepted" that the issue did not come before the Court again for forty years. *Nebraska Press*, 427 U.S. at 558. Although the next prior restraint case, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), did not involve the press, the Court used the occasion to reaffirm that "[a]ny prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity," and struck down an injunction that prohibited a neighborhood group from distributing its leaflets criticizing the racially-charged business practices of a local real estate broker. *Keefe*, 402 U.S. at 419 (quoting *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968)). Chief Justice Warren Burger rejected the lower court's conclusion that the leafleters were not protected by the First Amendment Free Speech Clause because their "literature was not to inform the public, but to 'force' respondent to sign a no-solicitation agreement." *Id.* Instead, Justice Burger held that the petitioners "plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper." *Id.*

Also in 1971, this Court issued the landmark prior restraint decision in the *Pentagon Papers* case, in which it held that the First Amendment's free press protections prohibited a court, even during wartime, from restraining *The New York Times, The Washington Post* and other newspapers from publishing classified documents about

the Vietnam War. *Pentagon Papers*, 403 U.S. at 714 (per curiam). Moreover, the Court refused to uphold the restraint "[n]otwithstanding that the source who had provided the documents had obtained them possibly as a result of criminal conduct and notwithstanding the government's contention that publication would gravely and irreparably jeopardize national security." *In re Providence Journal*, 820 F.2d 1342, 1348 (1st Cir. 1986), *modified*, 820 F.2d 1354 (1st Cir. 1987), citing *Pentagon Papers*, 403 U.S. at 730. In a concurring opinion, Justice Hugo Black rejected the government's assertion that "the courts should take it upon themselves to 'make' a law abridging freedom of the press in the name of equity, presidential power and national security," and concluded that "[n]o one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that [James] Madison and his collaborators intended to outlaw in this Nation for all time." *Id.* at 718-19 (Black, J., concurring). Justice Potter Stewart further noted that a prior restraint upon publication *always* will be unconstitutional, unless it can be shown that publication "will surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730 (Stewart, J., concurring).

Five years later, this Court reiterated that the heavy presumption against prior restraints applies even in the face of competing constitutional interests. *Nebraska Press Ass'n*, 427 U.S. at 570. In striking down a gag order barring reporters from publishing a criminal defendant's confessions before trial, the Court observed that the "thread running" through all of its previous censorship cases was that "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights," because unlike post-publication

civil or criminal sanctions, which may "chill" speech, prior restraints "freeze" future speech before the audience has the opportunity to hear it. *Id.* at 559.

This Court further outlined the dangers of enjoining First Amendment activity before its exact content is known in *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-17 (1980) (per curiam). In that case, the Court struck down a Texas statute that allowed courts to enjoin the exhibition of films not yet adjudged to be obscene. The government asserted that the scheme was constitutional because a judge, not a government censor, would decide the probable obscenity of future films based on an examination of *past* films. But this Court rejected the argument, emphasizing that the "heavy presumption" against prior restraints is grounded in "a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Id.* at 315 & n.13 (emphasis added). In an admonition that applies equally to this case, the Court stated that "[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Id.* at 315 n.13, quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (citation omitted).

C. Despite This Court's Strong Antipathy Toward Prior Restraints, The Federal Circuits And State Courts Are Divided On Whether The First Amendment Prohibits Injunctions Against Speech Based On Potentially Defamatory Statements.

Although this Court consistently has rejected prior restraints, there is a post-*Near* split among the federal

circuit courts on whether the First Amendment prohibits injunctions for future defamatory statements by individuals who are not members of the press. For example, in *Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees & Rest. Employees Internat. Union*, 239 F.3d 172, 176 (2d Cir. 2001), the Second Circuit vacated as unconstitutional an injunction prohibiting a union from publishing allegedly defamatory leaflets and letters and from chanting slogans such as "No More Lies" and "Shame On You," which the trial court found to be defamatory. The Second Circuit explained that it struck down the injunction in part because the speech "may ultimately, after full appellate review, be found constitutionally protected." *Id.* at 176. *See also Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963) (vacating as unconstitutional a stipulated order barring a credit rating service from making any future reports about a businessman). The First, Third, Fourth, Seventh, and D.C. Circuits also have vacated defamation-based injunctions in post-*Near* cases on constitutional and common law grounds. *E.g.*, *Kramer v. Thompson*, 947 F.2d 666, 680 (3d Cir. 1991); *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987); *United States v. Doe*, 455 F.2d 753, 760 n.4 (1st Cir. 1972); *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967). *See also In re Providence Journal*, 820 F.2d at 1350 (First Circuit) (holding that a district court's injunction barring a newspaper from publishing FBI records because they would violate plaintiff's privacy was "an insufficient basis for issuing a prior restraint" and plaintiff's "sole remedy was a subsequent action for damages").

But other federal circuits have affirmed post-*Near* injunctions of supposedly defamatory speech by non-journalists. *E.g.*, *San Antonio Comm. Hospital v. Southern Calif. Dist. Council of Carpenters*, 125 F.3d 1230, 1237 (9th

Cir. 1997); *Brown v. Petrolite Corp.*, 965 F.2d 38, 50-51 (5th Cir. 1992); *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206, 1208-09 (6th Cir. 1990). Petitioners have cited a similar split among the state courts. This split in authority demonstrates that a clear rule barring injunctions based on potentially defamatory statements about public figures is necessary to prevent further erosion of First Amendment protections.

D. Independently Of Its Prior Restraint Decisions, This Court Has Created Strong First Amendment Protections For Statements About Public Figures To Promote A "Robust" Public Debate.

At the same time that this Court has erected a high constitutional bar to government censorship of the media, it has recognized constitutional restrictions on defamation plaintiffs who sue the media. These post-publication protections serve the same purpose as the pre-publication protections: to promote and protect vigorous media reports and robust debate about public officials, figures, and issues. Thus, in *New York Times*, this Court held that the actual malice rule is necessary to protect the media and its sources from large defamation damage awards, even when they publish false statements about public officials. 376 U.S. 254 at 270-80. The Court recognized a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 271. Observing that "erroneous statement is inevitable in a free debate and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,'" *id.* at

271-72, the Court held that the First Amendment "prohibits" a public official from recovering defamation damages unless he can show the statement was made with knowing or reckless falsity. *Id.* at 279-80.

Ten years later, this Court expanded its protections for the media by extending the actual malice rule to "public figures," *i.e.*, those citizens who have assumed a position of power or influence in society. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). The Court explained that those citizens must be held to this higher standard because:

> [f]or the most part those who attain [public figure] status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classified as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

418 U.S. at 345 (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring)).

This Court explained that its extension of the actual malice rule to public figures was necessary to "administer[] an extremely powerful antidote to the inducement of media self-censorship of the common-law rule of strict liability for libel and slander." *Gertz*, 418 U.S. at 342. Another rationale for extending the actual malice rule was that public figures, like public officials, have a greater ability to use "self-help" by virtue of their "significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344.

In these decisions, this Court has erected substantial constitutional barriers for public officials and public figures seeking post-publication damages for false and defamatory statements. Those barriers are essential to prevent the chilling of public debate. Because the danger of chilling public debate is even greater where public figures seek permanent injunctions instead of damages, this Court should erect similar constitutional barriers to prior restraints sought by public figures.

II. THIS CASE DOES NOT PRESENT THE EXTRAORDINARY CIRCUMSTANCES NECESSARY TO JUSTIFY A PRIOR RESTRAINT AND REQUIRES A CLEAR RULE FROM THIS COURT DECLARING DEFAMATION-BASED INJUNCTIONS UNCONSTITUTIONAL.

The endorsement of a prior restraint by the California trial court and Court of Appeal on potentially defamatory speech departs from this Court's well-established precedents. The Los Angeles Superior Court rejected petitioners' contention that the injunction violated their constitutional free speech rights: "This is not a matter of speech related issues; it is simply the use of false and defamatory and privacy-invading communications to coerce or attempt to improperly coerce payment of money. . . ." (JA 43.)[2] The Superior Court generally found petitioners' statements on their picket signs to be "untruthful, misleading and malicious" – but expressly listed only the "crook" statement as false and defamatory. (JA 42, 48.) The court found that petitioners' continued picketing was "likely to damage"

[2] Citations to the Joint Appendix are styled "JA __."

respondent's "reputation" and had a "tendency" to injure his reputation. (JA 45.)

When petitioners appealed and asserted that the injunction was an unconstitutional prior restraint under *Near*, the Court of Appeal did not mention *Near* in its opinion, apparently because it concluded that that decision applied only to the press. Although the Court of Appeal acknowledged that "a prior restraint can be presumptively unconstitutional," it declared that this Court's rule against prior restraints announced in *Keefe*, 402 U.S. at 418-19, "has no application" to petitioners because "an injunction against a private person operates 'to redress alleged private wrongs,' not to suppress a legitimate publication." (JA 56.) The Court of Appeal therefore concluded that although the First Amendment protected the members of a community group who distributed leaflets in *Keefe*, that constitutional protection did not apply to petitioners' picketing activity on a public sidewalk.

The Court of Appeal's principal justification for the prior restraint was the trial court's "final adjudication on the merits" of the defamation claim and finding of "the pervasive use of libelous and slanderous statements [that] have been judicially determined" to be false and libelous under California law. (JA 57.) The Court of Appeal observed in a footnote that petitioners were likely to continue to "picket" respondent "absent restraint by the court." (JA 38-50, 58.)

There is no discussion in the decision below of this Court's requirements that a prior restraint must be justified to safeguard a "state interest of the highest order." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979). Nor did the Court of Appeal acknowledge that "speculati[on]" or "factors unknown and unknowable"

never can justify such an abridgement of the First Amendment. *Nebraska Press*, 427 U.S. at 563. Indeed, the Court of Appeal did not even articulate any governmental interest to justify the prior restraint, let alone a state interest "of the highest order." According to the California court, the prior restraint against petitioners is constitutional because it "simply precludes" petitioners "from continuing [their] unlawful activity" of making false and defamatory comments about a public figure, and precludes petitioners from making future criticisms of respondent that *might* be false and defamatory. (JA 57.) This concern is speculative and hardly constitutes a state interest "of the highest order." Moreover, under the Court of Appeal's rationale, any statement could be enjoined permanently if a judge found that the statement violated *any* state statute. This rationale has been rejected by other courts in the post-publication context. *See, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 526, 537, 539 (1989) (holding that the State of Florida's interest in preserving rape victims' privacy and encouraging rape victims to report crimes, as codified in a state statute barring the media from publishing a victim's identity, was insufficient to overcome the newspaper's First Amendment right to publish a rape victim's name that a reporter obtained from a sheriff's report inadvertently made public). Importantly, the California court's prior restraint in this case is subject to even more rigorous scrutiny than the post-publication civil judgment in *Florida Star*. *See Southeastern Promotions*, 420 U.S. at 559 (recognizing that prior restraints are a greater threat to First Amendment rights than post-publication penalties and subject to higher scrutiny).

A. This Court Should Reverse The Decision Below And Issue A Clear Prohibition Against Defamation-Based Prior Restraints Because They Weaken Constitutional Protections For The Public And The Press.

1. The First Amendment Protections Against Prior Restraints Must Protect Private Citizens Who Speak Out About Public Figures To Protect The Free Flow Of Information To The Public And The Press.

The California Court of Appeal's suggestion that the First Amendment protection against prior restraints does not apply to private citizens when a defamation plaintiff seeks "redress [for] private wrongs" defies clear authority. In fact, the sole authority to justify the injunction relied upon by the California court, *Keefe*, held to the contrary in striking down an injunction against private citizens who had been enjoined from distributing "coercive" leaflets criticizing a real estate broker. 402 U.S. at 419. In that case, this Court held that the leafleters' activity was constitutionally protected because it was "not fundamentally different from the function of a newspaper." Similarly, this Court held in *NAACP v. Claiborne*, 458 U.S. 886, 910-11 (1982), that the First Amendment protected NAACP members when they peacefully picketed outside targeted businesses, even though their intent was to encourage economic harm to businesses during a boycott. The California Court of Appeal's decision impermissibly conflicts with this clear precedent.

Moreover, although the harm to petitioners should not be minimized, prior restraints harm more than just those who are silenced. By barring petitioners from speaking about respondent in a "public forum," the California court

has effectively prohibited petitioners from speaking to the *Los Angeles Times* and other media organizations about their dispute with respondent.[3] Reporters are unable to ask petitioners about their claim that respondent did not adequately represent their interests in a civil rights lawsuit filed against the Los Angeles Police Department for an officer-involved shooting. (JA 38, 41-42, 52.) Thus, the court has restricted the flow of information to the public and press about this admitted public figure and "nationally known attorney." *Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d 1113, 1116 (C.D. Cal. 1998), *aff'd*, 210 F.3d 1036, 1038 (per curiam).[4] Respondent has garnered international fame from his role as lead defense counsel in O.J. Simpson's "highly controversial" murder trial in Los Angeles in 1995 that "implicated issues of national interest and concern," including "the criminal justice system itself." 58 F. Supp. at 1115-16. Respondent has continued to represent high-profile clients and has published an autobiography, *A Lawyer's Life*. *See* http://www.cochranfirm.com/media-cochranbook.html (last visited November 4, 2004). Yet respondent was unable to tolerate criticism from two former clients, and enlisted the courts to silence them – permanently – in the public fora where they are most likely to be heard by other clients, quoted by reporters, and noticed by the public.

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[3] Numerous California courts have held that press publications and broadcasts are public fora. *E.g.*, *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 474 (2000) (newsletter is a public forum); *Seelig v. Infinity Broadcasting*, 97 Cal. App. 4th 798, 808 (2002) (radio show is public forum).

[4] Respondent's unrelated defamation lawsuit for damages against the *New York Post* was dismissed on the ground that the challenged statement was "opinion" and therefore "absolutely protected by the First Amendment." 58 F. Supp. 2d at 1126.

As this Court reminded in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991), "[t]he press ... guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." (Citation omitted.) The Court also has observed that "[t]he judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations." *Id.* (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978)). By enjoining petitioners from speaking about respondent, the court below has reduced the flow of information about one of the most prominent officers of the court.

This Court has acknowledged that newsgathering "qualif[ies] for First Amendment protection," and that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681, 692-94 (1972). This protection derives from the recognition that reporters depend on access to a wide variety of sources, including private individuals, to provide important information about the operation of government, the actions of public figures, and important public issues that touch our lives. But the media's ability to gather and report news about public figures will be drastically reduced if courts are permitted to enjoin speech about public figures.

Other plaintiffs are likely to follow respondent's path, relying on permissive authority in other jurisdictions. With each new court approval of a prior restraint, courts will be less reluctant to impose this remedy against individuals and the press. Prior restraints will become more acceptable. This gradual erosion of this Court's rule against prior restraints threatens to undermine this

Nation's commitment to a vigorous debate on matters of public concern. As this Court observed, "[t]he damage can be particularly great when the prior restraint falls upon the communication of news and commentary about current events." *Nebraska Press Ass'n*, 427 U.S. at 559.

2. A Trial By A Judge That Determines That Past Statements Are Defamatory Cannot Be Used To Justify Government Censorship Of Future Statements.

The California Court of Appeal asserted that a permanent injunction enjoining future speech by a defendant "does not constitute an impermissible prior restraint" so long as the trial court holds "a full trial on the merits and finds that the speech at issue is not protected." (JA 57.) But this purported procedural safeguard fails for several reasons.

First, the California court ignores the "traditional rule . . . that equity will not enjoin a libel." *Metropolitan Opera Ass'n*, 239 F.3d at 177. "This rule rests in large part on the principle that injunctions are limited to rights that are without an adequate remedy at law, and because ordinarily libels may be remedied by damages, equity will not enjoin a libel absent extraordinary circumstances." *Id.* As this Court explained over 100 years ago, in vacating an order enjoining allegedly defamatory statements published in the press about a Mississippi River boat owner, "[i]f the publications in the newspaper are false and injurious, [the plaintiff] can prosecute the publishers for libel." *Francis*, 118 U.S. at 389. Defamation plaintiffs will always have an adequate remedy at law for damages; defendants must be accorded their right to a jury trial.

In addition to this jurisdictional barrier to prior restraints, defamation defendants are entitled to full appellate review of any asserted constitutional defenses in the wake of *New York Times* and its progeny. As this Court announced in that case, appellate courts must independently review the evidence in defamation cases "to determine whether it could constitutionally support a judgment . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times*, 376 U.S. at 285 & n.26. This Court conducted an independent review of the record of the jury trial, and concluded that the $500,000 defamation judgment could not stand because the public officials lacked clear and convincing evidence of actual malice and could not establish that the statements were "of and concerning" them. *Id.* at 285-88. The *New York Times* case illustrates the dangers of prior restraint. What if the plaintiffs in that case had asked the Alabama trial court to issue a permanent injunction against the clergymen and *The New York Times*, either in a preliminary injunction hearing or *after* the jury found that the published statements were defamatory? Under the rationale of the decision below, the trial court would have been able to enjoin the clergymen, who were not journalists, as well as the newspaper, from making any public statements about the local police officials based on the finding of past defamatory statements, during the peak of the civil rights movement in the South. The fact that this Court ultimately declared the statements to be constitutionally protected demonstrates the dangers of censoring speech based on an erroneous finding by a judge or jury.

But even with full appellate review, prior restraints based on potential defamatory statements are unconstitutional because it is impossible to determine in advance

whether a statement will be false, defamatory, injurious, or made with the requisite degree of fault. Circumstances change, such that a statement that may be false at one point in time may later be an accurate reflection of new facts. This Court has recognized the dangers of enjoining future speech because "[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Vance*, 445 U.S. at 315 n.13. Recognizing the fallacy of prophetically and prospectively adjudicating defamation claims, a California Court of Appeal decision recently concluded that a prior restraint based on potentially defamatory speech is unconstitutional, even where a court or jury had determined that *past* statements were actionable. *Balboa Island Village Inn, Inc. v. Lemen*, 121 Cal. App. 4th 583, 603 (2004). As the court explained, "[w]hile at the time of trial, those statements were false, whether any of those statements would be false and defamatory if published in the future depends on future events as well as the context in which any statement is made." *Id.* Thus, whether a statement is actionable "cannot be assessed until the statement is made." *Id. See also Wilson v. Superior Court*, 13 Cal. 3d 652, 661-62 (1975) (striking down injunction requiring campaign flyers to present "fair and balanced" account of rival's background because "petitioner was placed in the untenable position of speculating on whether his attempts to comply with the court orders were satisfactory or whether additional versions of the Newsletter would also be repressed").

For the most part, this Court's consistent bar against prior restraints has discouraged other courts from trying to censor the media and has helped to make prior restraints exceedingly rare in this Nation. But continued vigilance is

essential. If the California Court of Appeal's decision and similar decisions in other jurisdictions are allowed to stand, those decisions inevitably will invite other courts to issue prior restraints against other individuals. Although the decision below and the other defamation-based prior restraint decisions applied to non-media defendants, courts may use those decisions to justify injunctions against the media and their sources. Indeed, the California Court of Appeal in this case relied primarily on the California Supreme Court's prior restraint decision in *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal. 4th 121, 146-47 (1999), even though *Aguilar* did not deal with defamation; it enjoined speech in a private workplace because a jury had found that the defendant had violated a state employment discrimination statute by making racial slurs. (JA 57.) This bootstrapping illustrates the dangers of allowing courts to erode this Nation's strong historical and constitutional restriction of prior restraints.

This Court has recognized that First Amendment protections for the press are necessary for a vibrant democracy, which requires an "unfettered interchange of ideas for the bringing about of political and social change." *New York Times*, 376 U.S. at 269. Our Nation has a "profound national commitment to the principle that debate on public issues should be uninhibited," and a common understanding that "erroneous statement is inevitable in a free debate and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-72. Without a firm protection against prior restraints for potentially defamatory statements about public figures, the First Amendment's requirement that the government "shall make no law . . .

abridging the freedom of speech, or of the press" would be severely eroded.

CONCLUSION

This case provides the Court with the opportunity to reaffirm the strong prohibition against prior restraints that it articulated in *Near, Pentagon Papers,* and *Vance*. The First Amendment requires a categorical bar against prior restraints – against the media or against individuals – based on potentially defamatory statements about public figures. Anything less would undermine this Nation's commitment to "robust" public debate. *New York Times*, 376 U.S. at 269-70.

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APPENDIX A

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The California Newspaper Publishers Association is a nonprofit trade association representing about 500 daily

and weekly newspapers in California. CNPA has stood in defense of the rights guaranteed by the First Amendment for well over a century.

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The Washington Post publishes *The Washington Post*, a leading newspaper with a nationwide daily circulation of over 759,000 and a Sunday circulation of over 1.03 million.

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